(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C.**

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| In re: | ) | |
| Johnston Atoll Chemical Agent Disposal System | ) | RCRA Appeal No. 95-6 |
| Docket No. TTO 570 090 001 | ) | |

[Decided September 26, 1995]

***ORDER DENYING REVIEW***

***Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.***

**JOHNSTON ATOLL CHEMICAL AGENT DISPOSAL SYSTEM**

RCRA Appeal No. 95-6

**ORDER DENYING REVIEW**

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Decided September 26, 1995

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Syllabus

Petitioners Chemical Weapons Working Group, the Pacific-Asian Council of Indigenous Peoples, and the Institute for the Advancement of Hawaiian Affairs seek review of U.S. EPA Region IX's decision to grant a "Class 2" modification of a permit issued to the U.S. Army for the Johnson Atoll Chemical Agent Disposal System (JACADS) under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* The modification deleted a provision in the permit that limited operation of the facility to a five-year period following construction; that provision would have required JACADS to cease operations on June 30, 1995. Petitioners contend that the Region erred in using the permit modification process to delete the five-year operating restriction. In the alternative, petitioners contend that even if permit modification was appropriate, the Region should have classified the modification as "Class 3" instead of "Class 2."

Held: Review of the petition is denied. First, the Board rejects petitioners' contention that 40 C.F.R. § 270.50 prohibits extending a permit's duration by modification in this instance. The permit provision at issue is a "condition" of the permit that is not governed by § 270.50; in any event the Board construes the regulation as only prohibiting modifications that extend a permit's duration beyond the ten-year maximum set forth in the regulation. Second, the Board concludes that it is without jurisdiction to consider petitioners' challenge to the Region's classification of the modification as "Class 2" rather than "Class 3."

***Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.***

***Opinion of the Board by Judge Reich:***

The Chemical Weapons Working Group, the Pacific-Asian Council of Indigenous Peoples, and the Institute for the Advancement of Hawaiian Affairs (collectively "petitioners") have filed a petition for review of U.S. EPA Region IX's decision to grant a "Class 2" permit modification to the U.S. Army's permit for the Johnston Atoll Chemical Agent Disposal System (JACADS), issued under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq*. The modification deleted a condition in the permit that would have required JACADS to cease operations on June 30, 1995. Petitioners contend that the Region erred in granting the modification request, because, in petitioners' view, the "effective life" of a RCRA permit may be extended only through the issuance of a new permit, not by modification of the existing permit. Alternatively, petitioners contend that the Region erred in classifying the modification request as "Class 2" and that it should have been processed as a more significant "Class 3" modification. For the reasons explained below, the Board hereby denies review of the petition.

## **I.** *BACKGROUND*

JACADS is a hazardous waste treatment, storage, and disposal facility located on Johnston Atoll, a small island in the central Pacific Ocean. According to the Army's facility description (which is not disputed by petitioners) "JACADS is the first full scale operational facility constructed as part of the U.S. Army's Chemical Stockpile Disposal Program" required by a 1985 law. Army's Public

Notice of Permit Modification Request (Jan. 3, 1995). The purpose of the facility is to destroy a portion of the nation's stockpile of lethal chemical weapons, including rockets, mines, and bombs containing nerve agent (Sarin and "VX") and blister agent (mustard gas). JACADS is a prototype for similar facilities planned for construction in the continental U.S.[1]

Region IX issued a ten-year RCRA permit on August 30, 1985, authorizing the Army to construct and operate JACADS. The permit authorized the incineration of a fixed quantity of waste, consisting of the chemical weapons stockpile stored on Johnston Atoll. This waste originally constituted approximately 5% of the total U.S. stockpile; the amount of waste on Johnston Atoll subsequently was raised to 6.6% of the U.S. stockpile because of the receipt of additional weapons from a stockpile in Germany. Although the permit was issued for a ten-year term, until August 30, 1995, it also contained the following provision: "The facility may not be operated for more than five years once constructed." According to the Region's response to the petition, the five-year operating provision was included because "EPA and the Army expected that five years would be sufficient to complete this task."[2]

The facility began operating on June 30, 1990. On January 3, 1995, the Army submitted a request for a "Class 2" permit modification pursuant to 40 C.F.R. § 270.42(b).[3] The Army requested that the Region modify the permit by deleting

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[1]According to the Region's response to the petition for review, in 1985 Congress passed a law directing the Department of Defense to destroy at least 90% of the nation's chemical weapons stockpile by September 30, 1994. The date was later extended to December 31, 2004, consistent with the Chemical Weapons Convention signed by the U.S. and other nations in January 1993. Chemical weapons destruction is also required by the Bilateral Agreement on Destruction and Non-Production of Chemical Weapons, entered into between the U.S. and the former Soviet Union. *See* Region's Response to Petition at 2 and n.1.

[2]However, in its response to comments on the proposed permit modification, the Region indicated that it did not know why the five-year restriction was included in the permit. The Region stated that "the five-year restriction was not in the draft permit that was public noticed in 1985. It was added after public comment was submitted, although
we can find no record of a public comment that specifically suggested such a provision, or a record of how this was responsive to other public comments. In addition, the staff working on the project at that time * * * have since left EPA." Response to Comments at 11. The Region also stated that it believed the JACADS permit was the only permit containing such a restriction. *Id.*

[3]The Board has explained that:

> [P]ermittee-requested modifications are [organized] into three separate "classes" according to the substance of the requested change. Modifications classified under section 270.42 as "Class 2" or "Class 3" require prior notice to

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the permit provision limiting operation of JACADS to a five-year period following construction, thereby allowing JACADS to operate under the permit until its August 30, 1995 expiration date. In the public notice of the modification request, the Army stated that it was not possible to process all of the chemical weapons on Johnston Atoll within the five-year operating period, because additional weapons had been sent to the island for destruction after issuance of the permit,[4] and because JACADS had experienced "[u]nexpected operational problems." Public Notice at 3. The problems included equipment malfunctions, a release of chemical agent that necessitated a shutdown, personnel evacuations because of hurricane threats, and repair of damage caused by a hurricane in August 1994. *Id.* Further, on February 21, 1995, the Army submitted a permit renewal application for the entire permit. The renewal application continues the terms and conditions of the original permit beyond its expiration date (August 30, 1995) pending the Region's review of the application. *See* 40 C.F.R. § 270.51(a).[5]

In accordance with the requirements of 40 C.F.R. § 270.42(b) concerning processing Class 2 permit modifications, the Army publicly noticed its modification request, held a public meeting concerning the proposed modification, and the

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[3](...continued)

> the public, an opportunity for public comment, and a public meeting, whereas "Class 1" modifications involve less-significant changes and may therefore be implemented without prior public notice. In addition, modifications classified under section 270.42 as "Class 2" or "Class 3" are appealable to the Environmental Appeals Board, but "Class 1" modifications are not.

*In re Waste Technologies Indus.*, 5 E.A.D. RCRA Appeal No. 93-11, slip. op. at 8 (EAB 1995) (citations omitted).

[4]According to the Region's response to comments, processing of additional weapons received from Germany was authorized by a Class 3 permit modification. Response to Comments at 4.

[5]Section 270.51(a) states:

> (a) *EPA permits.* When EPA is the permit-issuing authority, the conditions of an expired permit continue in force * * * until the effective date of a new permit * * * if:
>
> (1) The permittee has submitted a timely application * * * for a new permit; and
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> (2) The Regional Administrator through no fault of the permittee, does not issue a new permit with an effective date * * * on or before the expiration date of the previous permit * * *.

40 C.F.R. § 270.51(a).

Region accepted comments on the modification request for sixty days following the public notice. It is undisputed that petitioners participated in the process by submitting comments and/or participated in the public hearing.[6] On May 3, 1995, the Region announced its approval of the modification, and provided its response to the comments received from the public. The Region explained that:

> The five-year permit condition is atypical for a RCRA incineration permit. It is not unusual for a facility to continue operating while a new permit is being considered.
>
> The modification does not change the conditions which limit the amount of weapons to be destroyed at JACADS. It also does not change how the weapons will be destroyed or the operating conditions which the facility must meet.
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> The current permit is protective of human health and the environment, and the Army must continue to abide by the requirements of this permit while a new one is being considered[.]

Region IX News Release (May 3, 1995). The petitioners filed a timely petition for review of that decision on June 2, 1995.

## **II.** *DISCUSSION*

### A. *Standard of Review*

Under the rules governing this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *see e.g.*; *In re Chemical Waste Management of Indiana, Inc.*, RCRA Appeal Nos. 95-2 & 95-3, slip op. at 5-6 (EAB, June 29, 1995); *In re Marine Shale Processors, Inc.*, 5 E.A.D. RCRA Appeal No. 94-12, slip op. at 14 (EAB 1995). The preamble to § 124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is

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[6] In accordance with 40 C.F.R. § 124.19(a), filing comments or participating in the public hearing are prerequisites to having standing to seek review of a final permit decision.

warranted is on the petitioner. 40 C.F.R. § 124.19(a); *see also Chemical Waste Management* at 5; *Marine Shale Processors* at 14. In this instance, petitioners have not met their burden of demonstrating that review is warranted.

B. *Petitioners' Claims*

Petitioners first contend that the Region's approval of the modification request deleting the five-year operating restriction was "inappropriate and contrary to law" because it effectively extends the active life of the facility. Petition at 6. Petitioners specifically claim that "[t]he removal of the permit condition has the effect of extending the operational life of the facility for an indefinite period as long as the new permit application is under review, where the facility would have otherwise been required to *cease* operations at the end of the five-year period, and during the permit renewal review process." *Id.* at 7. Petitioners argue that the only appropriate mechanism for effecting such a change in permit terms is obtaining a new permit. In support of their argument, petitioners point to 40 C.F.R. § 270.50, which states in pertinent part that:

> (a) RCRA permits shall be effective for a fixed term not to exceed 10 years.
>
> (b) Except as provided in § 270.51, the term of a permit shall not be extended by modification beyond the maximum duration specified in this section.
>
> (c) The Director may issue any permit for a duration that is less than the full allowable term under this section.

40 C.F.R. § 270.50(a)-(c). Petitioners argue that the five-year operating restriction established a permit duration "less than the full allowable term" pursuant to § 270.50(c), and that the five-year permit duration cannot be extended by modification because of the prohibition contained in § 270.50(b) ("the term of a permit shall not be extended by modification beyond the maximum duration specified in this section."). In response, the Region contends that the five-year operating restriction is simply an operating condition of a ten-year permit, not a permit "duration" within the meaning of § 270.50(c), and therefore that section is inapplicable. The Region further contends that even if the modification is interpreted as an extension of the permit's "duration," then the modification nevertheless is allowable under § 270.50(b). We agree.

First, the Region's contention that § 270.50(b) is inapplicable to the five-year operating restriction has some force. The permit establishes a ten-year term from August 30, 1985, until August 30, 1995; the five-year restriction is not the permit term but a condition of the permit affecting the operation of JACADS following completion of construction, which the parties apparently expected to occur at some point during the ten-year permit period, but which could not be predicted with certainty. Second, even if § 270.50(b) applies to the condition at issue, the language of the regulation contradicts the interpretation advanced by petitioners. Section 270.50(b) provides that the duration of a permit "shall not be extended by modification beyond the maximum duration *specified in this section*." *Id.* (emphasis added). We construe the "maximum duration specified in this section" as a reference to the ten-year maximum set forth in § 270.50(a) ("RCRA permits shall be effective for a fixed term not to exceed 10 years."). We agree with the Region that had the Agency intended to prohibit *all* extensions of permit durations by modification, it could have done so expressly. Instead, the regulation only prohibits modifications that extend a permit's duration beyond the ten-year regulatory maximum.

Accordingly, we reject petitioners' contention that the Region erred as a matter of law in modifying the JACADS permit to delete the five-year operating restriction. Petitioners further contend, however, that as a matter of policy any extension of a permit's duration (when the original duration is shorter in length than the ten-year regulatory maximum) should be handled as a permit renewal rather than modification. In particular, petitioners argue that permit expiration and reissuance is an important mechanism for providing regular scrutiny of permit compliance and revising permit conditions. The Region acknowledges that "regular scrutiny of permits is essential." Response to Petition at 9. However, as the Region points out, the permit modification in this case did provide an opportunity for scrutiny with respect to the five-year operating restriction contained in the original permit, and the JACADS permit as a whole is undergoing timely scrutiny as the Region considers whether to renew the permit.[7] In these circumstances, we cannot

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[7]In announcing its decision to modify the permit, the Region stated that:

> The U.S. EPA is fully committed to providing another opportunity for the public to comment during the review of the JACADS permit application. In addition to holding a public hearing, a workshop will be held this summer to provide an information exchange between the regulating agencies and the public about the JACADS facility and other operations at Johnston Atoll. The permit renewal application is currently available for comment.

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conclude that the Region's decision to modify the permit by deleting the five-year operating restriction raises a policy consideration which the Board should review.

Petitioners argue in the alternative that if modification is an appropriate means for deleting the five-year operating restriction, then the Regional Administrator abused her discretion by failing to require that the modification be processed as a "Class 3" modification instead of "Class 2."[8] 40 C.F.R. § 270.42 Appendix I sets forth a list of various types of permit modifications and the "classes" into which they fall for purposes of processing modifications. Class 1 modifications involve relatively minor permit changes and may be implemented without public notice. Class 2 modifications require a public comment period on the proposed modification and a public meeting sponsored by the permittee. Class 3 modifications require the Region to issue a draft permit setting forth the proposed modifications, provide a 45-day comment period, and hold a public hearing (if requested, or if the Region decides a hearing is appropriate). 40 C.F.R. § 270.42. In petitioners' view, although removal of an operating restriction such as the one at issue here is not specifically classified in the regulations, deletion of the restriction is a serious permit change that should receive the utmost process afforded by the Class 3 modification procedures (assuming *any* modification procedures can be utilized, which of course petitioners do not concede).

While the Region asserts that the classification was proper, it argues preliminarily that the Board is without jurisdiction to review the actual classification of the modification as "Class 2" (as opposed to a decision on the substance of a modification request). We agree. The applicable regulations provide that:

> The [Region's] *decision to grant or deny a Class 2 or 3 permit modification request* under this section may be appealed under the permit appeal procedures of 40 C.F.R. § 124.19.

40 C.F.R. § 270.42(f)(2) (emphasis added). In promulgating this regulation, the Agency specifically rejected a proposal that would have subjected the Region's

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[7](...continued)
EPA News Release (May 3, 1995).

[8]Petitioners moved for leave to file a reply brief supplementing its argument on this issue on August 23, 1995. The Region has not opposed that motion. Petitioners' motion is hereby granted, and the reply brief appended to the motion is accepted for filing as part of the Board's record on appeal.

classification decisions to administrative appellate review. In the preamble to the final permit modification regulations, the Agency stated that:

> For Class 1 modifications, temporary authorizations, *and classification determinations*, the appeal procedures of Part 124 do not apply, although in many cases there are opportunities to seek a change in the modification or authorization, as discussed in more detail below.

*Permit Modifications for Hazardous Waste Management Facilities* (Preamble), 53 Fed. Reg. 37,912 at 37,921 (1988) (emphasis added). Based on the foregoing, the Board has previously noted that "classification decisions are no more appealable to the Board than are the merits of Class 1 modification decisions." *In re Waste Technologies Indus.*, 5 E.A.D. RCRA Appeal No. 93-11, slip op. at 9 (EAB 1995).

The petitioners argue that the preamble language quoted above, read in context with other preamble language, indicates only that the Agency intended not to adopt an earlier proposal that would have allowed administrative appellate review of the classification decision independent of an appeal on the merits. Petitioners argue that the preamble language does not indicate that the Agency intended to foreclose all administrative review of a classification decision. For example, the petitioners quote the following passages from the preamble that follow the language quoted above:

> In the case of Agency classification determinations, *there will be subsequent public notification of the proposed changes as the facility proceeds with its modification request. The public will be able to raise concerns at that time if they believe that the modification request has been incorrectly classified. For these reasons, EPA believes that the [separate notice in the proposed rule] regarding a classification determination would be redundant, and therefore is not adopting it in today's rule.*
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> * * * * * * *
>
> [The proposed rule] provided for the appeal of the Director's decision to classify a permit modification request, under the procedures of Part 124. One commenter objected to the public being able to provide input and delay progress on the

> processing of an unclassified facility change. While EPA maintains that public involvement in these decisions is useful and important, it also believes that once a determination has been made as to the appropriate modification procedures for a particular facility change, the permittee's application should be processed accordingly. As discussed earlier, *the modification review process will provide an opportunity for indicating concerns regarding the Agency's classification decision. However, if a formal appeal were allowed for the classification decision, then a single appeal request could effectively require any modification to follow the class 3 process -- or else delay the modification process for months while awaiting the Administrator's decision on the appeal -- regardless of the merits of the appeal. Therefore, today's rule does not provide for appeals of [classification decisions]*.

53 Fed. Reg. at 37,922 (emphasis supplied by petitioners).

Based only on the foregoing paragraphs, petitioners' argument that the Agency rejected only an independent appeal of the classification decision might appear to have some merit. However, the remainder of the preamble language relied upon by petitioners seriously undermines that interpretation. The preamble goes on to say that:

> As discussed above, during the modification approval process the commenters will be able to indicate any concerns with the classification assigned by the Agency. If the Agency agrees with the comments, then it could reclassify the permittee's request and initiate the appropriate modification procedures. For example, if in the course of a Class 2 modification process the Agency is convinced by commenters to follow the Class 3 procedures instead, then the Agency would prepare the appropriate notification and draft permit as required by Part 124 after the Class 2 comment period is concluded. However, if the Agency disagrees with the request to reclassify the modification, then it must provide its response in the administrative record; *such decision constitutes a final Agency determination and is not subject to appeal under Part 124 procedures.*

53 Fed. Reg. 37,922 (emphasis added). The preamble could not be more plain: classification determinations are *not* subject to Part 124 review at any time.

Petitioners' only argument to counter the plain meaning of the preamble language is that the word "not" in the final sentence quoted above is a typographical error. In their view, the context of the paragraph generally reflects an intent to allow classification determinations to be raised on appeal; otherwise the Region would not be required to justify its refusal to reclassify a modification "in the administrative record." *Id.* We disagree. While the paragraph does reflect an intent to allow classification issues to be raised in comments during the modification process with the purpose of persuading the Agency to reclassify the pending modification, the preamble plainly states that classification determinations are not subject to administrative appeal. We find no support for the cavalier contention that the word "not" in the final sentence is a typographical error. The conclusion that classification decisions are not reviewable on appeal is further supported by the language of the final regulation, which limits appeals to the Region's decision to "grant or deny" the modification request. 40 C.F.R. § 270.42(f)(2). Accordingly, the Board is without jurisdiction to consider petitioners' challenge to the classification decision, and review is therefore denied.

## **III.** *CONCLUSION*

For the foregoing reasons, the petition for review is hereby denied with respect to petitioners' contention that the Region erred as a matter of law or policy in modifying the JACADS permit to delete the five-year operating restriction. The petition is denied for lack of jurisdiction with respect to petitioners' claim that the Region erred in classifying the modification as "Class 2."

So ordered.